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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/845,941	04/30/2001	Michael G. Hayek	IAM 0618 PA	3312

27752 7590 08/13/2003

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EXAMINER
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BAHAR, MOJDEH

ART UNIT	PAPER NUMBER
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1617

DATE MAILED: 08/13/2003

15

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/845,941

Applicant(s)

HAYEK ET AL.

Examiner

Mojdeh Bahar

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 22 May 2002.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-4, 10 and 11 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-4, 10 and 11 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All   b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                             | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____  |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)         | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ | 6) <input type="checkbox"/> Other:  |

**DETAILED ACTION**

***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on May 22, 2003 has been entered.

Applicant's amendment and remarks is persuasive to remove the obviousness rejection over Pscherer in view of UC Berkley Wellness Letters in the previous office action.

Claims 1-4 and 10-11 are herein examined on the merits.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-4 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reinhart (EP 0678247 A1).

Reinhart (EP 0678247 A1) teaches a pet food (for animals including cats) composition comprising omega-6 and omega-3 fatty acids, herein the ratio of said omega-6 fatty acids to said omega-3 fatty acids is from 3:1 to 10:1 (most preferably from 5:1 to 7.5:1), and wherein at least

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15% of the total fatty acids in said composition are said omega-6 fatty acids and at least 3% of the total fatty acids in said composition are said omega-3 fatty acids see in particular claims 1-2, and 4. Reinhart (EP 0678247 A1) also teaches that omega-3 fatty acids are one or more compounds selected from the group consisting of eicosapentaenic acid and docosahexaenic acid and alpha-linolenic acid, and omega-6 fatty acids are one or more compounds selected from the group consisting of fish oil and flax, see claims 5 and 6 in particular. Reinhart (EP 0678247 A1) teaches that the percentage of crude fat is 20-23%, see page 3, line 41 in particular.

Reinhart (EP 0678247 A1) does not teach the percentage of fat in the composition to be between 7 and 14%.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to employ between 7 and 14% of fat in the composition of Reinhart.

One of ordinary skill in the art would have been motivated to employ between 7 and 14% of fat in the composition of Reinhart because the prior art teaches the employment of fats in their compositions and optimization of amounts is within the skill of the artisan and is therefore obvious.

Claims 10-11 rejected under 35 U.S.C. 103(a) as being unpatentable over Reinhart (EP 0678247 A1) as applied to claims 1-4 above, and further in view of Brown et al. (USPN 4,229,485).

Brown et al. (USPN 4,229,485) teaches that cat foods can be canned or in kibble form. Brown et al. further teaches that vitamins and minerals can be added to the cat food. see in particular col. 1, line 1 to col. 2, line 40 and col. 5, lines 56-61.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to incorporate vitamins and minerals in the cat food composition of Reinhart. It would have also been obvious to employ the solid cat food of Reinhart in kibbles or canned cat food.

One of ordinary skill in the art would have been motivated to incorporate vitamins and minerals in the cat food composition of Reinhart because as taught by Brown et al., vitamins and minerals are known to be useful in cat food compositions. The Skilled Artisan would have also been motivated to incorporate the cat food of Reinhart in many different physical forms because these forms/types of cat food are all widely known in the art.

#### ***Response to Arguments***

Applicant's arguments filed May 22, 2003 have been fully considered but they are not persuasive. Applicant first argues that Reinhart "fails to teach a preferred source of omega-6 and omega-3 fatty acids, at any total fat level in any composition". Note that this statement is factually incorrect because claims 5 and 6 of Reinhart teach flax oil and fish oil as preferred sources of omega-3 fatty acids. Moreover, the instant claims do not state a preferred source of omega-6 fatty acids, and applicant's arguments based on unclaimed limitations, i.e., source of omega-6 fatty acids, is moot. In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., sources of omega-6 fatty acid) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Applicant further states that “in contrast, (to the prior art) rejected claims 1-4 require pet foods comprising omega-6 and omega-3 fatty acids, wherein the ratio of these components is about 5:1.” Note that all of the above limitations are taught by Reinhart:

“a pet food (for animals including cats) composition comprising omega-6 and omega-3 fatty acids, herein the ratio of said omega-6 fatty acids to said omega-3 fatty acids is from 3:1 to 10:1 (most preferably from 5:1 to 7.5:1)”

Applicant finally argues that the total fat level in the claimed limitations (7-14%) is different than that of the prior art (20-23%). Note that as stated herein above, the optimization of amounts is within the purview of the Skilled Artisan, and is therefore obvious, absent evidence to the contrary. Note that no such evidence has been presented. Applicant argues that flax seed oil shows minimal immunosuppressive activity compared to fish oil. Note that there is no showing to this effect in the specification. A showing of “unexpected results/benefits” needs to be clear, convincing and commensurate in scope (with the claims). It is applicant’s burden to demonstrate unexpected results over the prior art. See MPEP 716.02, also 716.02 (a) - (g). Furthermore, the unexpected results should be demonstrated with evidence that the differences in results are in fact unexpected and unobvious and of both statistical and practical significance. *Ex parte Gelles*, 22 USPQ2d 1318, 1319 (Bd. Pat. App. & Inter. 1992). Moreover, evidence as to any unexpected benefits must be “clear and convincing” *In re Lohr*, 137 USPQ 548 (CCPA 1963), and be of a scope reasonably commensurate with the scope of the subject matter claimed, *In re Linder*, 173 USPQ 356 (CCPA 1972).

In the instant case, no data is available for the evaluation of the unexpected result. On page 12 of the specification the applicant states that flaxseed oil offers a better alternative in a low lipid diet. Note that flaxseed oil is taught as one of the preferred embodiments of Reinhart

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as cited in claim 5. Note that no clear and convincing unexpected result over the prior art is seen herein.


In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mojdeh Bahar whose telephone number is (703) 305-1007. The examiner can normally be reached on (703) 305-1007 from 8:30 a.m. to 6:30 p.m. Monday, Tuesday, Thursday and Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padnmanabhan, can be reached on (703) 305-1877. The fax phone number for the organization where this application or proceeding is assigned is (703) 308-4556.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.

Mojdeh Bahar  
Patent Examiner  
August 5, 2003



RUSSELL TRAVERS  
PRIMARY EXAMINER